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LETTING THE PERFECT BECOME THE ENEMY OF THE GOOD: THE RELATEDNESS PROBLEM IN PERSONAL JURISDICTION

by
Robin J. Effron*

The Supreme Court's recent decision in J. McIntyre Machinery v. Nicastro had the potential to resolve nearly two decades of confusion in personal jurisdiction doctrine. Confronted with the earlier Asahi plurality opinions, which had established competing "stream of commerce" theories, the Court produced a fractured 4–2–3 opinion that resolved little beyond holding that the New Jersey courts could not exercise personal jurisdiction over the defendant in the instant case.

In this Article, I consider one dimension of the doctrinal deadlock that the Supreme Court produced in Nicastro: the concept of specific jurisdiction itself. In recent cases, most notably in Nicastro, the Court has become obsessed with the general and abstract contours of the relationship between a defendant and the forum state. However, one of the most important aspects of the distinction between general and specific jurisdiction is the relatedness between the lawsuit and the forum state. In conceptualizing relatedness at the highest level of generality, the Supreme Court has characterized the relatedness problem in a way that is nearly impossible to answer in any concrete case that comes before it. In other words, the Supreme Court has let the perfect become the enemy of the good. Instead of producing a flexible, workable, if not entirely global or perfect rule, the Court has given the lower courts hardly any rule at all.

This Article suggests that in order to break the stream of commerce stalemate, the Supreme Court should refocus specific jurisdiction doctrine so that it produces concrete answers to the two dimensions of the relatedness problem. It further argues that Justice Brennan's stream of commerce position from Asahi remains the most viable path for specific jurisdiction analysis. The expansive scope of the Brennan position fits well with modern understandings of commerce and the domestic and international sale and distribution of goods. Moreover, in tandem with a robust fairness analysis, the stream of commerce position will allow courts to examine the two dimensions of relatedness in a useful, concrete, and doctrinally consistent manner.

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INTRODUCTION

The Supreme Court's recent decision in *J. McIntyre Machinery v. Nicastro*¹ had the potential to resolve nearly two decades of confusion in personal jurisdiction doctrine. Confronted with the earlier *Asahi*² plurality opinions, which had established competing "stream of commerce" theories, the Court produced a fractured 4–2–3 opinion that resolved little beyond holding that the New Jersey courts could not exercise personal jurisdiction over the defendant in the instant case. The academic community met the *Nicastro* decision with almost unanimous disapproval, decrying the Court's inability to resolve the stream of commerce theory in particular and to articulate a coherent theory of personal jurisdiction in general.³ The fuzziness between general and specific jurisdiction, as well as the uncertainties in each of these doctrines

¹ 131 S. Ct. 2780 (2011).

² *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

³ See, e.g., Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245 (2011) ("The Supreme Court performed miserably. Its opinion in *J. McIntyre* ... is a disaster."); Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 344–46, 358–62, 367–69, 386–87 (2012) (The opinions "exacerbated rather than ameliorated the doctrinal confusion."); Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 241–42 (2011) ("[T]he cases may serve to increase the confusion of the lower courts about the requirements for establishing both general and specific jurisdiction."); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 515 (2012) (calling the "lack of a majority opinion" in *Nicastro* "disappointing").

themselves can be attributed to a lack of a coherent theory underlying the exercise of personal jurisdiction at all.⁴ In this Article, I join the chorus of critics and suggest that we might shed new light on this debate by revisiting an old concept—specific jurisdiction—and that to fully understand the quandary of specific jurisdiction, we must look outside of personal jurisdiction itself.

The critiques leveled against the Supreme Court's jurisdictional jurisprudence are well-known: that the doctrine is fuzzy, malleable, and highly case specific, and that the Court has been either unable or unwilling to provide a comprehensive and coherent legal and political theory underlying the exercise of personal jurisdiction over defendants in a forum state.⁵ This doctrinal confusion culminated in the *Nicaastro* case, with Justices who could not command a majority and an opinion that communicates very little in the way of useful information to lower courts and future litigants.

In this Article, I consider one dimension of why *Nicaastro* has resulted in decision paralysis at the Supreme Court: the concept of specific jurisdiction itself. When *Nicaastro* is considered alongside its companion case, *Goodyear Dunlop Tires Operations, S.A. v. Brown*,⁶ a picture of the problems caused by an under-theorized doctrine of specific jurisdiction

⁴ See, e.g., Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) (“[Personal jurisdiction doctrine] is a body of law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be divined.”); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1027 (1995) (“American jurisdictional law is a mess. . . . [The Court is unable] to devise a satisfactory approach to the simple question of where a civil action may be brought.”); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 532 (1991) (“Until we finally identify the underlying problem for which personal jurisdiction is the solution, the doctrinal muddle will persist.”); Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 101 (2010) (“[The Supreme Court has been unable] to enunciate a coherent theory of precisely why the Due Process Clause imposes limitations on the states’ exercises of personal jurisdiction.”); Peterson, *supra* note 3, at 241 (“[T]he cases may serve to increase the confusion of the lower courts about the requirements for establishing both general and specific jurisdiction.”).

⁵ See, e.g., Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998) (“Ambiguity and incoherence have plagued the minimum contacts test”); Perdue, *supra* note 4, at 530 (“[E]very few years, the Court’s description of personal jurisdiction is inconsistent with its recent prior precedent.”); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 850 (1989) (“[T]he Supreme Court . . . has failed to expound a coherent theory of the limits of state sovereignty over noncitizens or aliens.”). See generally Frederic M. Bloom, *Jurisdiction’s Noble Lie*, 61 STAN. L. REV. 971 (2009); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981).

⁶ 131 S. Ct. 2846 (2011).

emerges. The puzzles of general and specific jurisdiction are not new,⁷ but the extent to which they have wreaked havoc in recent jurisprudence underscores the need to resolve these difficulties in a speedy and orderly fashion.

In recent cases, most notably in *Nicastro*, the Court has become obsessed with the general and abstract contours of the relationship between a defendant and the forum state.⁸ However, one of the most important aspects of the distinction between general and specific jurisdiction is an examination of the relatedness between the lawsuit and the forum state.⁹

When viewed from the perspective of relatedness, the problem of specific jurisdiction is a variant of other procedural puzzles that all seek to answer the same question: How common is common enough? This question is woven through procedural doctrines involving joinder, aggregate litigation, amendment of pleadings, and subject matter jurisdiction, and is notoriously difficult to answer. In conceptualizing relatedness at the highest level of generality, the Supreme Court has let the perfect become the enemy of the good. Instead of producing a flexible, workable, if not entirely global or perfect rule, the Court has given the lower courts hardly any rule at all.

The relatedness inquiry can and should be tied to the underlying purpose of the procedural device. In other words, the relatedness inquiry is most successful when the perfect has not become the enemy of the good, and the good is tied to sound procedural purposes. In earlier work, I have criticized the jurisprudence of relatedness and commonality in doctrines such as joinder.¹⁰ My claim there is that courts are overly focused on factual specificity and insufficiently attentive to the purpose that the concept of relatedness serves.¹¹ The issue in personal jurisdiction presents a mirror image of that problem: with such an intense focus on competing theories of jurisdiction, courts and scholars have been inattentive to the role that factual relatedness to the lawsuit can and should play in the jurisdictional inquiry.

The divide between general and specific jurisdiction, and the reluctance to engage with specific jurisdiction on its own terms provides one explanation for the startling gap between the fractured *Nicastro* decision and the unanimous and clearly reasoned opinion in *Goodyear*. The gulf between these two cases suggests that the Court is perfectly capable of developing theories and rules of personal jurisdiction when

⁷ See, e.g., Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

⁸ See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787–89 (2011).

⁹ *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 nn.8–9 (1984); *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir. 1994).

¹⁰ See generally Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759 (2012).

¹¹ *Id.* at 789.

one dimension of the problem of relatedness is removed from the picture. Assuming, then, that specific jurisdiction is founded on sound constitutional and conceptual grounds, the challenge for the future is to fashion a jurisprudence of relatedness that can function in harmony with the underlying theories of personal jurisdiction, rather than obscuring them. Moreover, when the “fuzziness” of jurisdictional doctrine is attributed to *relatedness* rather than to the underlying power of the sovereign itself, the Court might find itself less paralyzed by the fear of drawing the Due Process line in the “right” place, and instead be willing to deliver clear rules of personal jurisdiction that give better direction to litigants and lower courts.

This Article proceeds in three Parts. Part I traces the history of personal jurisdiction through the lense of the relatedness problem, and argues that the Court has elided the two dimensions of the relatedness problem—the relationship between the defendant and the forum, and the relationship between the lawsuit and the forum—in a way that has made some specific jurisdiction cases nearly impossible to answer. It then delivers a detailed critique of the *Nicastro* opinion and the Court’s failure to articulate a majority opinion, and contrasts it with the deceptively easy and unanimous *Goodyear* opinion.

Part II offers further reflections on how a sharper focus on the relationship of the lawsuit to the forum can help to move the Court beyond its decision paralysis. First, this Part argues some procedural doctrines, such as joinder and personal jurisdiction, are not successful when they are framed in terms generalized abstract relatedness questions. It then argues that *Nicastro*’s failure can be attributed, at least in part, to this problem. This Part then suggests that the path away from decision paralysis must include a commitment by the Supreme Court to avoid framing the personal jurisdiction problem in terms of abstract relatedness.

Part III revisits the concept of nationwide contacts that are inclusive of a forum state and argues that it remains the best path toward a coherent and consistent specific jurisdiction doctrine. This Part further argues that adopting the “nationwide contacts” view espoused by Justice Ginsburg in her *Nicastro* dissent might be the best way forward, but that it is possible only when seen as a proper and limited consequence of the exercise of specific jurisdiction. Far from being an unwieldy and overbroad doctrine, nationwide contacts function appropriately in stream of commerce cases because they are *limited* by the concept of specific jurisdiction which ties the lawsuit specifically to the forum, rather than the defendant generally. Moreover, if Justice Brennan’s vision from *Asahi* is revived and invigorated, the fairness factors from *World-Wide Volkswagen*¹² can guard against the excessive exercises of jurisdiction. In addition to putting appropriate limitations on unfair exercises of

¹² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

jurisdiction, the fairness factors can be construed so as to encourage an examination of the question of the defendant's relatedness to the forum, thus ensuring that courts consider both aspects of relatedness in a concrete manner.

I. PERSONAL JURISDICTION AND DECISION PARALYSIS

In this Part, I argue that the Supreme Court has reached a point of decision paralysis in personal jurisdiction doctrine and that this paralysis will continue so long as the Court searches for a definitive answer to the relatedness problem. I do not mean to suggest that the relatedness problem is the only source of trouble plaguing personal jurisdiction jurisprudence. Plenty of ideological and theoretical hurdles stand between the doctrine as it currently stands and a coherent articulation of personal jurisdiction standards. A closer look at the relatedness problem, however, will move the debate forward in a healthy way.

A. *The Relatedness Problem and the Path to the Stream of Commerce Crisis*

The relatedness problem in personal jurisdiction has two dimensions. First, there is the problem of the relationship between the *defendant* and the forum state. Second, there is the problem of the relationship between the *lawsuit* and the forum state. Although these two problems are interconnected, they form distinct analytical categories. Unfortunately, many judges and commentators do not treat them as such. Instead, relatedness is an open and fluid category in which judges slip back and forth between comments about the relationship between a defendant and the forum and comments about the relationship between the lawsuit and the forum. Treating the relatedness problem as a broad and vague category is not a successful strategy for procedural questions.¹³

The *Nicastro* and *Goodyear* opinions are the latest chapter in the development of personal jurisdiction doctrine. Detailed and thorough histories of personal jurisdiction abound;¹⁴ thus, my aim here is to situate the reader in the context of the latest jurisprudence.

1. *Specific Jurisdiction and the Divergence of Categories of Relatedness*

The journey to decision paralysis began in 1945 with *International Shoe Co. v. Washington*, in which the Supreme Court announced that an out of state corporation could be subject to personal jurisdiction in the

¹³ See *infra* Part II.A (discussing the relatedness problem in joinder).

¹⁴ See, e.g., Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Influence of Justice Brennan*, 63 S.C. L. REV. 551 (2012); Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction over Foreign Defendants*, 59 ALB. L. REV. 1389 (1996); Perdue, *supra* note 4; William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599 (1993); Flavio Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CALIF. L. REV. 1545, 1546–52 (1994); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 620–25 (2006).

forum state if it had “certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹⁵

International Shoe contained the seeds of both general and specific jurisdiction. Specific jurisdiction involves jurisdiction over parties whose contact with the forum state is related to the lawsuit.¹⁶ General jurisdiction, on the other hand, is “dispute-blind” meaning that a court of a forum state may exercise jurisdiction over any claim against a party regardless of the relationship of the party’s contacts with the forum state and the lawsuit at hand.¹⁷ The Court in *International Shoe* did not specify whether the facts of that case supported general or specific jurisdiction, suggesting at some points that Washington State could exercise jurisdiction over the company because of its “systematic and continuous” activities in the state, but at other times that jurisdiction was fair because the lawsuit itself “arose out of those very activities.”¹⁸

The ambiguity between general and specific jurisdiction in *International Shoe* was understandable. The “general” and “specific” terminology itself did not even come into usage until 1966 when Professors von Mehren and Trautman coined the terms in a law review article.¹⁹ *International Shoe* contained enough of a revolution, dispensing as it did with the fiction of physical presence in the forum state,²⁰ and kicking off the modern constitutional requirement of minimum contacts for long-arm jurisdiction.²¹ It would thus be unfair to accuse the Court of decision paralysis this early in the modern era of personal jurisdiction.

The Supreme Court cases in the decades following *International Shoe* produced the now-familiar vocabulary of minimum contacts, an arsenal

¹⁵ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁶ *See id.* at 317–19; *see also* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 & nn.8–9 (1984).

¹⁷ Twitchell, *supra* note 7, at 613.

¹⁸ *Int’l Shoe Co.*, 326 U.S. at 320.

¹⁹ Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–37 (1966).

²⁰ *Int’l Shoe Co.*, 326 U.S. at 316–17 (“[T]he terms ‘present’ or ‘presence’ are used merely to symbolize those activities . . . which courts will deem to be sufficient to satisfy the demands of due process.”); *see also* Eric C. Hawkins, Note, *General Jurisdiction and Internet Contacts: What Role, if Any, Should the Zippo Sliding Scale Test Play in the Analysis?*, 74 FORDHAM L. REV. 2371, 2373 n.15 (2006) (“The Court moved away from the legal fiction of the ‘presence’ requirement, reasoning that a measurement of the defendant’s activities in the forum could take its place.”); Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 762–63 (2003) (“[A]fter rejecting the old ‘presence’ test . . . the Court . . . create[d] a brand-new test for a major area of the law”); Peterson, *supra* note 4, at 107 (“In *International Shoe Co. v. Washington*, the Supreme Court established a much more flexible standard for analyzing personal jurisdiction, but one that was still linked to the Due Process Clause.” (footnote omitted)).

²¹ *See Int’l Shoe Co.*, 326 U.S. at 316.

of words including “purposeful availment,”²² “targeting” the forum state,²³ “foreseeability,”²⁴ and a fairness vocabulary of burdens and benefits.²⁵ Although the constitutional underpinnings of personal jurisdiction lie in the Due Process Clauses of the Fifth and Fourteenth Amendments, the Court produced an ever-shifting definition of this right, stating sometimes that it is grounded in “interstate federalism”²⁶ and at others that it is “a matter of individual liberty.”²⁷

During these years, the specter of relatedness haunted personal jurisdiction jurisprudence.²⁸ Although the Court did not adopt the von Mehren and Trautman terminology until the 1980s,²⁹ the premise of specific jurisdiction grounded much of the Court’s jurisprudence.³⁰ This proved relatively unproblematic when there was a tight one-to-one connection between the relationship of the defendant to the forum and the relationship of the lawsuit to the forum. In *International Shoe* itself, for example, the defendant’s contacts with Washington State (selling shoes via independent salesman) were intimately connected with the lawsuit (whether the state could recover unpaid contributions to an unemployment fund for the activities of those salesmen).³¹ Likewise, the defendant in *McGee v. International Life Insurance Co.* had a single contact with the State of California, sending an insurance contract to a California resident, and it was upon that contract that the lawsuit was based.³²

²² *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

²³ *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1078 (9th Cir. 2003); *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003).

²⁴ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 476 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 297 (1980).

²⁵ See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring in part and concurring in the judgment); *Burger King Corp.*, 471 U.S. at 476; *World-Wide Volkswagen Corp.*, 444 U.S. at 292; see also Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT’L L.J. 323, 368 (1992) (“[T]he Court gradually and fatefully slid into the now well-known concepts and vocabulary [of personal jurisdiction].”).

²⁶ *World-Wide Volkswagen Corp.*, 444 U.S. at 294.

²⁷ *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); see also Borchers, *supra* note 3, at 1246–47; Richman, *supra* note 14, at 606–07. But see Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1591 (1992) (noting the different constitutional sources of personal jurisdiction limitations); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 415 (2004) (defending *Ins. Corp. of Ireland* as consistent with interstate federalism concerns); Trangsrud, *supra* note 5, at 896–98.

²⁸ See Spencer, *supra* note 14, at 618 (arguing that the Supreme Court’s personal jurisdiction jurisprudence has done “more to confuse and complicate the doctrine than Professors von Mehren and Trautman had done to clarify it”).

²⁹ See *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 nn.8–9 (1984).

³⁰ *Id.* at 414.

³¹ *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³² *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

Therefore, in cases like *McGee* and *International Shoe* there was little need to discuss the type of relatedness grounding jurisdiction because there was no obvious divergence between the relatedness of the defendant to the forum and the relatedness of the lawsuit to the forum.

The concept began to unravel, however, in cases where the two relatedness dimensions did not correspond as neatly.³³ In *World-Wide Volkswagen*, for example, the relationship between the lawsuit and the forum was fairly high, while the relationship between two of the defendants and the forum was very low. The plaintiffs had sued the car manufacturer, distributors, and dealership in Oklahoma where the devastating accident had taken place.³⁴ Two defendants challenged personal jurisdiction: the dealer, which was incorporated and located in New York, and the regional distributor, which was located in New York and sold cars and associated parts to retail dealers in New York, Connecticut, and New Jersey. Neither defendant had contacts with the forum state beyond any vehicles sold in the tri-state area and brought to Oklahoma by other individuals.³⁵

In its opinion, the *World-Wide Volkswagen* Court chose the relationship between the defendant and the forum as the dominant lens through which to view the jurisdictional problem.³⁶ The relationship between the lawsuit and the forum, however, makes a few guest appearances in the opinion, turning up as an interest that the plaintiff might have in choosing her forum or the forum state might have in exercising jurisdiction over particular incidents.³⁷

It is no wonder that courts and commentators parsing the decision had trouble pinning down its precise meaning. Surely the relationship between the lawsuit and the forum must be of some relevance. Otherwise the Court could have dispensed with the specific jurisdiction analysis entirely and conducted a straightforward general jurisdiction analysis of World-Wide Volkswagen's and Seaway's connection to Oklahoma with no reference to the auto accident in question. However, having assumed that the relationship between the lawsuit and the forum state was of some unspecified relevance to the jurisdictional inquiry, the opinion appears

³³ See Bloom, *supra* note 5, at 985 (“[T]his prescribed approach has grown elaborate, even convoluted in parts. Its ‘general’ and ‘specific’ options are saddled with multiple layers, overlapping features, and ‘accumulat[ed]’ supplements.” (alteration in original) (quoting McMunigal, *supra* note 5, at 195)).

³⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

³⁵ *Id.* at 288–89.

³⁶ *Id.* at 295.

³⁷ There is a rich academic debate regarding the scope of this interest, questioning whether the state's interest is an *ex ante* regulatory interest in certain types of activity, or a more specific *ex post* interest in resolving disputes with strong ties to the forum. See Stein, *supra* note 27, at 420–29; Brilmayer, *supra* note 7, at 1449; see also Stein, *supra* note 27, at 434 (describing a “regulatory precision” theory that would “consider the impact of [a court’s] assertion of jurisdiction on the allocation of authority nationally and internationally”).

to leave open the possibility that the defendants might have been subject to jurisdiction in some *other* foreign forum, albeit one closer to their homes in New York, perhaps in the other two “tri-state” region states of Connecticut and New Jersey, or a bordering state such as Pennsylvania. In other words, by blending the two problems of relatedness, the Court teed up the stream of commerce problems in the most problematic of relatedness terms: How close is close enough?

2. *General Jurisdiction and the Uneasy Absence of a Lawsuit-Relatedness Paradigm*

Meanwhile, the Court’s consideration of general jurisdiction cases did little to advance the analytical ball. The Court has entertained far more specific jurisdiction cases than general jurisdiction cases,³⁸ and the line between the two concepts looks especially blurry in light of the fact that the Supreme Court heard very few “true” general jurisdiction cases prior to *Goodyear*.³⁹ In 1984, the Supreme Court issued its opinion in *Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*.⁴⁰ This case was a curious choice as a vehicle for general jurisdiction analysis because many of the defendant Helicol’s contacts with the forum state of Texas were connected to the contract for the sale of helicopters that ultimately resulted in an accident in Peru, but the Court refrained from discussing the meaning of any potential relatedness.⁴¹ The Court lurched forward with its conclusion that Helicol did not conduct the sort of systematic and continuous activity necessary for general jurisdiction,⁴² but the awkward fact of the relatedness of the defendant’s contacts with the lawsuit clouded the clarity and utility of the opinion.⁴³ In the same year the Court decided *Helicol*, Professor Richman described specific and general jurisdiction as a sliding scale in which, “[a]s the quantity and quality of

³⁸ See Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 129 (“[T]he Supreme Court has decided more specific [than general] jurisdiction cases in recent years.”).

³⁹ See *id.* at 123–26 (recounting the rare instances of “true” general jurisdiction cases and noting that “[the Supreme Court’s general jurisdiction cases each had] special circumstances that limit the explanatory value of the majority opinion”); see also Twitchell, *supra* note 7, at 635. This was also true of lower court cases. See Rose, *supra* note 14, at 1557–58.

⁴⁰ 466 U.S. 408 (1984).

⁴¹ The Texas Supreme Court limited its inquiry to interpretation of the State’s long-arm general jurisdiction statute. Thus, the Supreme Court considered only the general jurisdiction basis for jurisdiction. *Id.* at 413 n.7.

⁴² *Id.* at 415–16.

⁴³ See Charles W. “Rocky” Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a “Generally” Too Broad, but “Specifically” Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 149–54 (2005) (discussing *Helicol* and the dispute-blind nature of general jurisdiction); see also Stein, *supra* note 27, at 440 (discussing similar problems with lower court opinions and noting that “additional connections between the claim and the forum . . . might have rendered jurisdiction appropriate under a specific jurisdiction framework, and the courts would have been well advised to limit their holdings to those circumstances”).

the defendant's forum contacts increase, a weaker connection between the plaintiff's claim and those contacts is permissible; as the quantity and quality of the defendant's forum contacts decrease, a stronger connection between the plaintiff's claim and those contacts is required."⁴⁴ However, the lack of direct engagement with the relationship between the claim and the contacts resulted in the clumsy formalism of *Helicol* and jurisprudentially unsatisfying *World-Wide Volkswagen*.

Professor Twitchell told a different story of *Helicol*, identifying a doctrine of "conditional general jurisdiction."⁴⁵ According to Twitchell, courts supposedly deciding cases under a general jurisdiction framework had actually been considering the relatedness of the contacts to the lawsuit.⁴⁶ The *Helicol* case, Twitchell argued, set firmer limits on the exercise of general jurisdiction, particularly in cases where the contacts do appear to have some relationship to the cause of action.⁴⁷ Thus, "[b]y clarifying the limits of general jurisdiction, the Court has signaled to the lower courts that they cannot continue to use general jurisdiction concepts to shield what are essentially claim-related evaluations."⁴⁸ However, if tightening the limits of general jurisdiction was supposed to shift attention to the difficult and unresolved foundations and limits of specific jurisdiction, one wonders what went wrong in the years following *Helicol*, one wonders about the utility of the sliding scale in a world in which courts only sometimes give serious and separate consideration to the relationship between the forum contacts and the lawsuit. In other words, "general jurisdiction's problems are at least partly about specific jurisdiction; sensible and predictable bases of general jurisdiction should cause no difficulty."⁴⁹

While general jurisdiction theoretically should have focused courts' attention entirely on the relationship of the defendant to the forum with no mention of the relationship of the lawsuit to the forum, it did not do so. Instead, the muddled relatedness analysis in general jurisdiction was emblematic of the overall neglect of the nuances of relatedness categories in personal jurisdiction.

3. *The Relatedness Problem Produces the Stream of Commerce Crisis*

Given these doctrinal and theoretical difficulties, it came as little surprise that by the late 1980s the Court was "having difficulty generating majority opinions."⁵⁰ The stream of commerce cases were a lightning rod

⁴⁴ William M. Richman, Review Essay, 72 CALIF. L. REV. 1328, 1345 (1984) (reviewing ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS (1983)).

⁴⁵ Twitchell, *supra* note 7, at 650–52.

⁴⁶ *Id.* at 635.

⁴⁷ *Id.* at 651–52.

⁴⁸ *Id.* at 652.

⁴⁹ Borchers, *supra* note 38, at 119.

⁵⁰ Perdue, *supra* note 4, at 530; *see also* Stein, *supra* note 27, at 433 ("The courts have been struggling for years outside the Internet context to refine the meaning of purposeful availment.").

for the problems of personal jurisdiction. Placing an item in the stream that is eventually used or sold in the forum state is undoubtedly *a* contact with the forum, but a question remained over whether that contact meets the constitutional threshold of a minimum contact. These troubles culminated in the 1987 *Asahi* decision.⁵¹ The plaintiff in *Asahi* was injured in a motorcycle accident in California and alleged that the accident was caused by a defect in the rear tire. He sued Cheng Shin, the Taiwanese tire manufacturer. Cheng Shin then impleaded *Asahi*, a Japanese corporation that manufactured a valve used in the tire. The plaintiff settled his suit with Cheng Shin, so that only Cheng Shin's lawsuit against *Asahi* remained, and *Asahi* challenged the California court's jurisdiction.⁵²

The Supreme Court held 9–0 that California lacked personal jurisdiction over *Asahi*. But, as any first-year law student knows, looks are deceiving, and the Court did not deliver a majority opinion as to the reasoning behind the judgment. The two major plurality opinions, each garnering four votes, set the terms of the argument as a debate between the “stream of commerce” and “stream of commerce plus” doctrines.⁵³ Under Justice Brennan's stream of commerce doctrine, a defendant manufacturer has minimum contacts with the forum state if its products reach the forum state through a “chain of distribution”⁵⁴ and the “regular and anticipated flow of products from manufacture to distribution to retail sale.”⁵⁵ *Asahi* represented a special case in which jurisdiction would be contrary to “fair play and substantial justice” because the burden on *Asahi* was particularly high and the interests of the original plaintiff and the forum state were unusually low.⁵⁶

Justice O'Connor, on the other hand, introduced the “stream of commerce plus” doctrine. Simply placing manufactured items that might foreseeably reach the forum state in the stream of commerce does not a minimum contact make. A defendant must target or “purposefully direct” its conduct toward the forum state.⁵⁷ Despite “*Asahi's* awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes [in motorcycles] sold in California,” *Asahi* had not “purposefully avail[ed] itself of the California market,” and therefore did not have minimum contacts with the state.⁵⁸

⁵¹ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

⁵² *Id.* at 105–07.

⁵³ *Id.* at 112 (O'Connor, J., plurality opinion) (stream of commerce plus); *id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) (stream of commerce). A third position, Justice Stevens' volume–value theory, was difficult to discern and never gained much traction in the lower courts. *See id.* at 121–22 (Stevens, J., concurring in part and concurring in the judgment).

⁵⁴ *Id.* at 120 (Brennan, J., concurring in part and concurring in the judgment).

⁵⁵ *Id.* at 117.

⁵⁶ *Id.* at 116.

⁵⁷ *Id.* at 112 (O'Connor, J., plurality opinion).

⁵⁸ *Id.*

Post-*Asahi*, the lower courts did their best to sort out the doctrine.⁵⁹ Not only did courts need to choose between the two competing doctrines,⁶⁰ but the contours of the doctrines themselves required more definition. Further complicating matters, these problems and splits increased with the development of the Internet, which provided new iterations of older problems.⁶¹ Disagreements arose as to whether the stream of commerce or the stream of commerce plus doctrines applied to fully manufactured goods or component parts;⁶² what role sales through a distributor should play;⁶³ whether the product sold was considered “hazardous,”⁶⁴ or what should happen if a plaintiff buys a product in one forum and then is injured in another forum in which the product is also sold.⁶⁵ Courts and commentators also questioned whether

⁵⁹ See Peterson, *supra* note 3, at 207–10 (providing a history of the stream of commerce doctrines).

⁶⁰ Compare *Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 479–80 (6th Cir. 2003) (adopting the O'Connor stream of commerce plus test), with *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) (finding the Brennan stream of commerce test is “determinative”).

⁶¹ See, e.g., Borchers, *supra* note 38, at 128 (“With the rise of e-commerce to multi-billion dollar proportions, and as interstate and international transactions over the Internet become increasingly common and nearly frictionless, the radical indeterminacy of American jurisdictional principles is a major problem.” (footnote omitted)); Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575, 586–600 (1998) (“Whether one can find consistency in the lower court’s treatment of jurisdiction and the Internet is debatable.”); A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 73 (“The advent and extensive use of the Internet have presented new challenges for the law of personal jurisdiction.”). But see Stein, *supra* note 27, at 411 (“My position is that the Internet does not pose unique jurisdictional challenges.”).

⁶² Compare *Hoffpauir v. Linde Lift Truck Corp.*, No. 03-CV-1279, 2007 WL 963187, at *3 (W.D. La. Mar. 28, 2007) (applying stream of commerce doctrine to nonresident component manufacturers), and *Pegasus Helicopters, Inc. v. Gen. Motors Corp.*, 954 F. Supp. 218, 220 (D. Colo. 1997) (same), with *Stanton v. St. Jude Med., Inc.*, 340 F.3d 690, 694 (8th Cir. 2003) (requiring purposeful availment for exercise of personal jurisdiction over nonresident component manufacturer).

⁶³ See *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir. 1994) (sale of products through a distributor does not prevent finding of specific jurisdiction); *Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528, 544 (6th Cir. 1993) (use of a national distributor with other evidence of purposeful availment sufficient for specific jurisdiction); *DeMoss v. City Mkt., Inc.*, 762 F. Supp. 913, 919 (D. Utah 1991) (some evidence of purposeful availment, is necessary, “but it need not be direct”); see also Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 554–55 (1995) (describing the pre- and post-*Asahi* “parade of horrors” in which manufacturers can insulate themselves from liability behind “layers of independent distributors”).

⁶⁴ See *Morris v. SSE, Inc.*, 843 F.2d 489, 494 (11th Cir. 1988).

⁶⁵ *Parry v. Ernst Home Ctr. Corp.*, 779 P.2d 659, 660–61 (Utah 1989).

either of the stream of commerce doctrines should apply to both specific and general jurisdiction cases.⁶⁶

Asahi thus failed to give much guidance for how to answer the question, How close is close enough? At one level, the disagreement among the justices reflects a disagreement over the permissible scope of attenuation. For Justice Brennan, placing an item in the stream of commerce that will foreseeably end up in the forum state is sufficiently related for purposes of personal jurisdiction, whereas Justice O'Connor (and, to a certain extent, Justice Stevens⁶⁷) were looking for a closer relationship. From this vantage point, the stream of commerce argument is a disagreement about degree. Those looking for an answer to the question, How related is related enough? in *Asahi* might believe that the answer is to be found somewhere on a continuum of relatedness between the Brennan and O'Connor's positions.

On a deeper level, however, *Asahi* underscores a larger conflict about the dimensions of the relatedness problem. Justice O'Connor's "stream of commerce plus" doctrine calls for a generalized relatedness inquiry, in which the various aspects of the defendants relationship to the forum and the lawsuit's relationship to the forum are amalgamated so that at a certain point they cross the threshold from too attenuated to sufficiently related. Justice Brennan's stream of commerce theory, on the other hand, sets out a framework in which different aspects of the relatedness inquiry can be disaggregated. Assuming that the forum state is the place of injury, the foreseeability prong of the Brennan doctrine provides a clear answer to the question of how closely related the lawsuit must be to the forum state. However, the fairness prong of Brennan's personal jurisdiction doctrine recognizes that the second relatedness dimension of the connection between the defendant and the forum state can be addressed separately, as a part of the fairness analysis.

Even on this understanding, none of the Justices explicitly identified the two dimensions of relatedness of playing distinct and complementary roles, particularly in specific jurisdiction analysis. Instead, the lack of agreement exacerbated the need to resolve the stream of commerce problem itself, and the problem of personal jurisdiction increasingly became a problem of relatedness.

B. The Stream of Commerce Comes to the 21st Century: Nicastro and Goodyear

After nearly two decades of silence from the Supreme Court, the legal community awaited the *Nicastro*⁶⁸ and *Goodyear*⁶⁹ decisions with

⁶⁶ See Peterson, *supra* note 3, at 213 n.73 (citing general jurisdiction cases based on direct sales into the forum state).

⁶⁷ Justice Stevens wrote an opaque concurrence in *Asahi* promulgating a "volume-value" theory of personal jurisdiction. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 121 (1987).

⁶⁸ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

baited breath, hoping for a more definitive resolution to the stream of commerce problem. The collective disappointment in the Court's opinions in these cases was immediately palpable.⁷⁰

Nicastro and *Goodyear* were both products liability cases where the respective state courts premised personal jurisdiction on stream of commerce theories. The plaintiff in *Nicastro*, a New Jersey metal worker named Robert Nicastro, severely injured his hand while operating one of J. McIntyre Machinery's metal-shearing machines. He sued J. McIntyre in New Jersey state court.⁷¹ The plaintiffs in *Goodyear*, the general jurisdiction case, were the families of two North Carolina teenagers who were killed in a bus accident in France who alleged that tire defects had caused the accident. They sued Goodyear North America, as well as three Goodyear manufacturing and distributing subsidiaries from Turkey, France, and Luxembourg in North Carolina state court.⁷² In both cases, the state courts upheld personal jurisdiction over the foreign defendants.⁷³

By the time the Supreme Court was through with these cases, it had produced a unanimous decision in *Goodyear* and a fractured, 4–2–3 decision in *Nicastro*.⁷⁴ The Court's twenty-year collision course with the relatedness problem produced the decision paralysis in *Nicastro* and a deceptively easy solution in *Goodyear*. I do not mean to discount the role that numerous other doctrines and theories have played in perpetuating the personal jurisdiction crisis, and thus do not offer relatedness as a unifying theory and its resolution as a universal panacea. I do hope, however, to revive a discussion of relatedness and the special roles that the concepts of general and specific jurisdiction play.

1. J. McIntyre Machinery v. Nicastro

J. McIntyre Machinery was incorporated in England, and its factory, also located in England, produced industrial-grade machinery for use in the metal recycling industry.⁷⁵ J. McIntyre did not make direct sales of its goods to consumers or end-users in the United States. Instead, like many foreign manufacturers, J. McIntyre engaged an independent distributor to sell its wares throughout the country. The distributor was based in Ohio and marketed and sold the machines throughout the United States.

⁶⁹ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

⁷⁰ *See supra* note 3.

⁷¹ *Nicastro*, 131 S. Ct. at 2786.

⁷² *Goodyear Dunlop*, 131 S. Ct. at 2850.

⁷³ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 594 (N.J. 2010); *Brown v. Meter*, 681 S.E.2d 382, 395 (N.C. Ct. App. 2009), *rev. denied*, 695 S.E.2d 756 (N.C. 2010).

⁷⁴ *Goodyear Dunlop*, 131 S. Ct. at 2850; *Nicastro*, 131 S. Ct. at 2785 (Kennedy, J., plurality opinion) (joined by Chief Justice Roberts and Justices Scalia and Thomas); *id.* at 2791 (Breyer, J., concurring in the judgment) (joined by Justice Alito); *id.* at 2794 (Ginsburg, J., dissenting) (joined by Justices Sotomayor and Kagan).

⁷⁵ *Nicastro*, 131 S. Ct. at 2786.

As many as four machines were sold to customers in New Jersey, including the offending metal shearer that injured the plaintiff.⁷⁶ The manufacturer directed sales and marketing efforts for the U.S. through its distributor and attended trade shows in U.S. locations outside of New Jersey. However, it did not make any direct sales in New Jersey, nor did it have an office there.⁷⁷ For six justices, these facts were enough to conclude that New Jersey could not exercise personal jurisdiction over the manufacturer.⁷⁸

The splintered opinion demonstrates the Supreme Court's continued decision paralysis on the stream of commerce issue. One of the only clear things about the *Nicastro* opinion is that the Justices could not agree upon any number of the theoretical underpinnings of personal jurisdiction. Rather than coalesce around one or more legal or philosophical principles, the Justices displayed very different visions of what personal jurisdiction analysis should be. The plurality and concurring opinions are divided in their approaches to the case at hand and in their approaches to personal jurisdiction generally. They are, however, united by a failure to consider seriously the problem of relatedness in personal jurisdiction. Justice Breyer appears to be waiting for an answer to a question where the answer does not exist, and Justice Kennedy has wished the question itself away.⁷⁹ For both, the perfect has become the enemy of the good.

Justice Kennedy's plurality opinion, itself no model of clarity, accomplished two things. First, it revived the principle of forum sovereignty as central to the exercise of personal jurisdiction.⁸⁰ Declaring that "personal jurisdiction requires a . . . sovereign-by-sovereign . . . analysis,"⁸¹ Justice Kennedy stressed time and time again that contacts with the United States as a whole were entirely different from contacts with New Jersey. So long as the defendant was targeting the American market generally, it had not targeted New Jersey.⁸² He even carefully reserved the question of whether it would be constitutional for Congress, if it so chose, to designate the United States as a forum for personal

⁷⁶ *Id.*

⁷⁷ *Id.* at 2786, 2790.

⁷⁸ *Id.* at 2785, 2791.

⁷⁹ See *id.* at 2791 (Breyer, J., concurring in the judgment) ("I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences."); *id.* at 2790 (Kennedy, J., plurality opinion) ("The defendant's conduct . . . will differ across cases and judicial exposition will, in common-law fashion, clarify the contours of that principle.").

⁸⁰ Sovereignty theories embrace the adjudicatory and law-making power of the forum as the primary basis for jurisdictional authority. See Spencer, *supra* note 14, at 640, 647. But see Redish, *supra* note 5 (critiquing sovereignty theories).

⁸¹ *Nicastro*, 131 S. Ct. at 2789.

⁸² *Id.* at 2790 ("These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.").

jurisdiction purposes for cases pending in federal courts.⁸³ Second, the Kennedy plurality firmly rejected the Brennan stream of commerce position, stating that it “is inconsistent with the premises of lawful judicial power”⁸⁴ and that “the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures.”⁸⁵

Justice Breyer’s opinion, joined by Justice Alito, is decision paralysis writ large. Underneath his equivocation about jurisdictional theories and his quibbles about the suitability of *Nicastro* as a vehicle for announcing personal jurisdiction doctrine, one finds a deep discomfort with the concept of specific jurisdiction. An examination of Breyer’s opinion reveals that he is so concerned with the potential future problems posed by a generalized relatedness inquiry—an inquiry that curiously overlooks the facts of the present litigation—that he ignores the role that specific jurisdiction can play in grounding the relatedness problem and breaking it into smaller, more easily answerable questions.

Although Justice Breyer concurs in the judgment, he is unwilling to sign on to the strict formalism of the Kennedy position because he “do[es] not agree with the plurality’s seemingly strict no-jurisdiction rule.”⁸⁶ He is equally unwilling to join the dissenters in either wholeheartedly adopting the Brennan stream of commerce position, or in explicitly endorsing the nationwide contacts theory, under which the defendant “purposefully availed itself” of the United States market nationwide,” and “thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.”⁸⁷

Justice Breyer’s claim is that the *Nicastro* case fits so obviously within previous precedent that the case can be disposed of on its facts. Breyer seems to be consumed with regret that *Nicastro* was not an Internet or e-commerce case and begins his opinion with a pout:

I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.⁸⁸

⁸³ *Id.* Compare Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 4 (1984) (arguing that “a nationwide personal jurisdiction statute providing that a defendant located in or having minimum contacts with the United States can be sued on a federal question in any federal court in the country would be unconstitutional” (footnotes omitted)), with *Casad*, *supra* note 27, at 1599–1606 (arguing that “nationwide personal jurisdiction in federal question cases should be provided by Congress” and is constitutional).

⁸⁴ *Nicastro*, 131 S. Ct. at 2789.

⁸⁵ *Id.* at 2791.

⁸⁶ *Id.* at 2793 (Breyer, J., concurring in the judgment).

⁸⁷ *Id.* at 2801 (Ginsburg, J., dissenting).

⁸⁸ *Id.* at 2791 (Breyer, J., concurring in the judgment).

Of course, having announced his reluctance to engage with the case at hand, Breyer goes on to deliver a vague and ambiguous analysis of the situation.

The refusal to engage broadly with the facts of *Nicastro* is, at one level, baffling. Although the *Nicastro* facts do not contain the fancy and new-fangled trappings of the Internet, they present a solid, ongoing, and unresolved problem: When may a forum exercise jurisdiction over a manufacturer who sells goods that injure someone in a forum state? That goods are sold to end-users in a forum state by distributors or as components of larger products is not a startling or a new fact. It was true of the world in 1945, truer of the world in 1987, and will continue to be true of the world in 2012 and beyond. Wishing that the case involved the “realities” of modern communications does not change the need to resolve an issue affecting how most products wind up in our homes and in our workplaces. If the Court cannot generate a majority opinion with the relatively cut-and-dry facts of the *Nicastro* case, it is rather difficult to believe that it will be able to do so in other cases in the future.

Breyer’s desire to postpone jurisdictional decisions for an Internet case also indicates a somewhat naive assumption that a case involving “modern communications realities” will implicate a stream of commerce situation like *Nicastro* at all. Internet cases will come in all shapes and sizes—as questions whether a “virtual store” subjects certain businesses to general jurisdiction⁸⁹ or specific jurisdiction,⁹⁰ whether certain types of blogging, commenting, or posting defamatory statements on the Internet will subject a defendant to jurisdiction under the *Calder* effects test,⁹¹ or how sales through e-commerce intermediaries might affect a distribution scenario like the one in *Nicastro* itself. While the Internet and e-commerce present new challenges, it is unlikely that the Court will need entirely new jurisdictional tools to accommodate these facts.⁹² Ignoring these nuances allows Breyer to fantasize about a future of clearer principles without grappling with present doctrinal challenges.

Beyond Breyer’s misplaced concerns about *Nicastro*’s suitability as a vehicle for announcing personal jurisdiction rules, the opinion

⁸⁹ Compare *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1078 (9th Cir. 2003) (finding general jurisdiction over L.L. Bean which operated a “virtual store” in the forum state via its website), with *Caiazza v. Am. Royal Arts Corp.*, 73 So. 3d 245, 258–59 (Fla. Dist. Ct. App. 2011) (holding that there was no general jurisdiction over business based solely on website activity).

⁹⁰ See *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 451–54 (3d Cir. 2003).

⁹¹ See *Calder v. Jones*, 465 U.S. 783 (1984); see also *Griffis v. Luban*, 646 N.W.2d 527, 534–36 (Minn. 2002) (applying a narrow version of the *Calder* effects test); *Novak v. Benn*, 896 So. 2d 513, 517–20 (Ala. Civ. App. 2004) (discussing *Griffis* with approval).

⁹² See Stein, *supra* note 27, at 411–12 (suggesting that the Internet itself does not pose new problems, but only highlights “some fundamental mistakes that both courts and commentators have made in conceptualizing the nature of due process constraints on jurisdiction”). But cf. Redish, *supra* note 61, at 605–06 (suggesting “an Internet exception to the purposeful availment requirement”).

demonstrates more generally that he has turned the stream of commerce problem into a question that cannot be satisfactorily answered. Consider how Breyer construes the opposing positions of the Kennedy plurality and the New Jersey Supreme Court (and, by extension, the Ginsburg dissent). According to Justice Breyer, Justice Kennedy offers “strict rules that limit jurisdiction” while the New Jersey Supreme Court’s rule is an “absolute approach” and an “automatic . . . rule” that “would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer . . . no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue.”⁹³

Having cast the two positions as polar opposites, Breyer sets about showing why he believes the dissenter’s rule is unworkable. Noting that “manufacturers come in many shapes and sizes,” he frets about the fate of the humble Appalachian potter or the small Egyptian shirt maker.⁹⁴ By implication, he acknowledges that larger manufacturers might have produced, sold, marketed, or otherwise “done” enough to be subjected to personal jurisdiction in a forum state. Aside from these broad generalizations, Breyer has done little beyond turning back the clock to precisely where it was after *World-Wide Volkswagen*, leaving lower courts and lawyers with little clue as to how close to a forum state is close enough. It is easy enough to rally sympathies for a small Brazilian manufacturing cooperative, or local Kenyan coffee farmer, but Breyer gives no indication of how we should know whether the Appalachian potter could be subject to personal jurisdiction in neighboring North Carolina, in further-distant Florida, or in far-away California. This is because there is no single, precise answer to the question, How close is close enough?, and Justice Breyer would probably be nervous delivering any answer on either side of the imaginary line for fear that, in future cases, that line might be located elsewhere. His appeal to the status quo is disingenuous, for in a world where due process reigns, no rule is almost worse than picking the wrong rule.⁹⁵

The most notable feature of Justice Breyer’s hand-wringing is that he seems to have lost touch with the concept of specific jurisdiction as a tool with any utility in answering these questions. At one point he opines that adopting the dissenter’s view “would abandon the heretofore accepted inquiry of whether, focusing upon the relationship between ‘the defendant, the *forum*, and the litigation,’ it is fair, in light of the

⁹³ *Nicastro*, 131 S. Ct. at 2793.

⁹⁴ *Id.* at 2794.

⁹⁵ Professor Bloom has suggested that seemingly strict and rigid rules of jurisdiction actually mask a more flexible approach crafted to allow the judiciary ample space in creating jurisdictional doctrine. Cases like *Nicastro* show how easily the Court has been fooled by its own rhetoric of hard and inflexible rules, when in fact, “[p]ersonal jurisdiction is not some inevitable limit on judicial authority,” but instead is “a tool of subtle pliability and quiet discretion.” Bloom, *supra* note 5, at 1000.

defendant's contacts *with that forum*, to subject the defendant to suit there."⁹⁶ In fact, Justice Breyer's view diminishes the role of the relationship between the forum and the litigation to almost zero. As his italics demonstrate, he is concerned almost entirely with the relationship of the defendant to the forum. The litigation itself is an afterthought. This is evident in his concerns about future defendants. While he spills much ink wondering about the fate of a small and distant manufacturer, he says nothing about what the *lawsuits* might be in which they are potential defendants, and how those lawsuits might be related to the forum.⁹⁷

Thus, Breyer's concurrence is almost as notable for what it omits as it is for what it discusses. The opinion is nearly devoid of a discussion of the relationship between J. McIntyre's contact and the lawsuit.⁹⁸ Breyer repeatedly emphasizes that J. McIntyre's only contact with the state of New Jersey was the "single sale" of the machine that reached the state.⁹⁹ Gliding right past the *McGee* doctrine that a single contact with the forum can be a constitutionally sufficient minimum contact,¹⁰⁰ Breyer concludes that "[n]one of [the Court's] precedents finds that a single isolated sale . . . is sufficient."¹⁰¹ Breyer thus seems to be more concerned with the relationship of the sale to the forum than with the relationship of the sale to the lawsuit. J. McIntyre manufactured and sold a large piece of highly sophisticated and dangerous machinery, a machine that stood at the center of the plaintiff's lawsuit. In other words, the opinion does not investigate why any increase in marketing or targeting short of a direct sale into the forum state would change the relationship between *this sale* and *this lawsuit* for the purposes of specific jurisdiction. Instead, the reader is warned of unlimited jurisdiction over the poor potter at her wheel with no consideration of what role the hypothetical manufacture, distribution, and sale of her product would play in some unspecified future lawsuit.

It is this failure that has led Justice Breyer down the path of decision paralysis, finding himself in a place where he is looking for an elusive "fixed 'point' between 'unconstitutional' and 'merely undesirable' [that] proves impossible to find."¹⁰² Having stated the problem in terms that can never be answered to his satisfaction, he has marginalized the very concept of specific jurisdiction that could clarify the terms of the debate.

⁹⁶ *Nicastro*, 131 S. Ct. at 2793 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

⁹⁷ *See id.* at 2791–94.

⁹⁸ *See* Steinman, *supra* note 3, at 490 ("Neither Justice Kennedy's nor Justice Breyer's opinion addresses this link between J. McIntyre's own activities in the United States and the purchase of the machine by the New Jersey company for whom Mr. Nicastro worked.").

⁹⁹ *Nicastro*, 131 S. Ct. at 2792.

¹⁰⁰ *See McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

¹⁰¹ *Nicastro*, 131 S. Ct. at 2792.

¹⁰² Bloom, *supra* note 5, at 1000.

Both Breyer and Kennedy fear that the wrong choice of a jurisdictional rule would result in an unacceptable violation of a defendant's due process rights.¹⁰³ One wonders, however, how the failure of the Court to provide any rule at all is any comfort to parties who should be able to depend on the stability and predictability of jurisdictional rules in planning their affairs.¹⁰⁴ Lower courts are already split as to whether Breyer's opinion means that the Court has rejected the Brennan stream of commerce position,¹⁰⁵ or whether the *Nicastro* opinion is so narrow as to have little application beyond factual situations nearly identical to it.¹⁰⁶ Some even have dropped rather unsubtle hints of displeasure at the Court's inability to reach a decision, stating, for example, that "*McIntyre* has little to no precedential value."¹⁰⁷

¹⁰³ See *Nicastro*, 131 S. Ct. at 2789 (Kennedy, J., plurality opinion); *id.* at 2791 (Breyer, J., concurring in the judgment).

¹⁰⁴ See Rhodes, *supra* note 43, at 137 (suggesting that a "functional doctrine" of personal jurisdiction would include "some measure of predictability").

¹⁰⁵ See *Smith v. Teledyne Cont'l Motors, Inc.*, Civil Action No. 9:10cv2152, 2012 WL 10836, at *3–4 (D.S.C. Jan. 3, 2012) ("Thus, six Justices agree that, at a minimum, the limitations of Justice O'Connor's test should be applied Therefore the 'stream-of-commerce plus' test now commands a majority of the Court."); *Windsor v. Spinner Indus. Co.*, 825 F. Supp.2d 632, 638 (D. Md. 2011) ("*McIntyre* clearly rejects foreseeability as the standard for personal jurisdiction."). Some courts have read the case as rejecting the Brennan position as it would apply to a nationwide contacts theory. Compare *Oticon v. Sebotek Hearing Sys., LLC.*, Civil Action No. 08–5489 (FLW), 2011 WL 3702423, at *9 (D.N.J. Aug. 22, 2011) ("[W]hether or not the plurality's strict rule is the de-facto standard for stream-of-commerce cases going forward, there is no doubt that *Nicastro* stands for the proposition that targeting the national market is *not* enough to impute jurisdiction to all the forum States."), with *Eastman Chem. Co. v. AlphaPet Inc.*, Civ. Action No. 09–971–LPS–CJB, 2011 WL 6004079, at *18 (D. Del. Nov. 4, 2011) ("Justice Breyer's opinion (along with the three-justice dissent) suggests that intent to serve the national market, when coupled with other factors, remains a viable basis for the exercise of jurisdiction under stream-of-commerce theory.").

¹⁰⁶ See *UTC Fire & Sec. Ams. Corp. v. NCS Power, Inc.*, No. 10 Civ. 6692(LTS)(THK), 2012 WL 423349, at *9 (S.D.N.Y. Feb. 10, 2012) ("The plurality opinion . . . does not categorically foreclose the exercise of personal jurisdiction based on a 'stream of commerce' theory."); *Ainsworth v. Cargotec USA, Inc.*, Civil Action No. 2:10–CV–236–KS–MTP, 2011 WL 6291812, at *2 (S.D. Miss. Dec. 15, 2011) (holding that "Justice Breyer's *McIntyre* opinion was only applicable to cases presenting the same factual scenario as that case," and "declin[ing] to depart from the Fifth Circuit precedents holding that mere foreseeability is a constitutionally sufficient basis for the exercise of personal jurisdiction under the stream-of-commerce theory"); *Original Creations, Inc. v. Ready Am., Inc.*, No. 11 C 3453, 2011 WL 4738268, at *5 (N.D. Ill. Oct. 5, 2011) ("[C]ase law utilizing [the stream of commerce] approach has been left undisturbed" because "the *Nicastro* Court does not discard [it].").

¹⁰⁷ *Ainsworth*, 2011 WL 6291812, at *4; see also *Sieg v. Sears Roebuck & Co.*, No. 3:10cv606, 2012 WL 610961, at *5 (M.D. Penn. Feb. 24, 2012) ("In light of the failure of a Supreme Court majority to adopt clearly one of the two *Asahi* standards, we will continue with the Third Circuit Court of Appeals' approach.").

Justice Breyer, however, is not the lone culprit in this jurisdictional escapade. Justice Kennedy, by eliding the concepts of the relatedness of the defendant to the forum and the relatedness of the lawsuit to the forum into strict and probably unhelpful rules of sovereignty, has allowed others' attention to wander from the quandary of specific jurisdiction. The dissenters, meanwhile, missed an opportunity to seize on the virtues of specific jurisdiction to solidify Justice Brennan's stream of commerce theory into a workable and appealing doctrine. Some clues to solving the mystery may be found in the Court's *Goodyear* decision.

2. Goodyear Dunlop Tires v. Brown

On some levels, *Goodyear Dunlop Tires Operations, S.A. v. Brown*,¹⁰⁸ succeeded where *Nicastro* failed.¹⁰⁹ *Nicastro*, with its 4–2–3 opinion, did not do anything to solve the persistent stream of commerce problem in personal jurisdiction, and arguably left the doctrine even worse off than it had been after *Asahi* in 1987. Contrast this muddled state of affairs with the orderly and unanimous opinion in *Goodyear*, and it can be hard to believe that the two opinions were the product of the same court on the same day. The most obvious difference between the two cases is that *Goodyear* is a general jurisdiction case and *Nicastro* a specific jurisdiction case. These differences, however, also extend to how the Court perceived and responded to the relatedness problem.

Von Mehren and Trautman's terminology forms the starting point for Justice Ginsburg's analysis.¹¹⁰ The plaintiffs' claims in *Goodyear* did not involve "adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'"¹¹¹ Thus, the North Carolina court would need general jurisdiction over the defendants in order to exercise personal jurisdiction. Having identified general jurisdiction as the proper mode of analysis,¹¹² the Court could proceed to analyze the only relevant dimension of relatedness: the relationship of the defendant to the forum. The bus accident in which the plaintiffs perished took place in Paris, France, and the allegedly defective tires responsible for the accident were manufactured and distributed entirely within Europe.¹¹³ However, because the Court carefully delineated this case as one of general jurisdiction, these facts are not used to *distance* the defendants

¹⁰⁸ 131 S. Ct. 2846 (2011).

¹⁰⁹ See Allan R. Stein, *The Meaning of "Essentially at Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527, 528 (2012) ("I believe that the case will prove to be one of the wisest and most consequential jurisdictional decisions in recent years.").

¹¹⁰ *Goodyear Dunlop*, 131 S. Ct. at 2851.

¹¹¹ *Id.* at 2851 (quoting von Mehren & Trautman, *supra* note 19, at 1136).

¹¹² *Id.* at 2853.

¹¹³ *Id.* at 2851–52.

from the forum state. Rather, Justice Ginsburg simply treats these facts as irrelevant.¹¹⁴

The Court then considered the relationship of Goodyear's three European subsidiaries to the forum. The Court held that, although a small percentage of the European tires were distributed in North Carolina, the subsidiaries did not have the sort of systematic and continuous contact with the forum and therefore were not "fairly regarded as at home" in North Carolina.¹¹⁵ Their connections to the state were "attenuated" and "f[e]ll far short of 'the continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State."¹¹⁶

The unanimity in *Goodyear* thus extends beyond the holding and even the reasoning of the case. The Justices have agreed on three distinct fronts. First, they agreed on the *terms* of the debate: this is a case about general jurisdiction. Second, they agreed on the *issue* to be resolved: this case requires an investigation of any and all contacts that the defendants had with the forum. Finally, they agreed on the *answer*: Based on their business activities, the defendants did not have systematic and continuous contact with the forum state and were not at home there. Because *Goodyear* did not involve any contacts that were related to the lawsuit, there was no risk of the pesky fact that part of the defendants' contact with North Carolina, no matter how small, was somehow related to the plaintiffs' misfortune.¹¹⁷ This cleared the way for Justice Ginsburg to view the defendant's contacts with some distance.

The opinion is not perfect. Going forward, one can expect further debate and development in the lower courts as to what it means for a defendant to be "at home" in a forum state.¹¹⁸ Other commentators will address that issue ably.¹¹⁹ Thus, I will confine my comments here to the impact that the relatedness problem will have on this analysis. Solving the problem of where (and when) a corporation is "at home" will require answering a version of the question, How close is close enough? The Court has provided answers for the easier cases: a corporation that has its

¹¹⁴ *Id.* at 2851 ("Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy.").

¹¹⁵ *Id.* at 2854–58.

¹¹⁶ *Id.* at 2857 (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984)).

¹¹⁷ One arguable contact with the forum was the fact that the plaintiffs were residents of North Carolina. However, this relationship between the plaintiff and the forum is *lawsuit specific* and therefore not within the province of general jurisdiction.

¹¹⁸ See Michael H. Hoffheimer, General Personal Jurisdiction After *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 K.U. L. REV. 549, 551 (2012) (arguing that the *Goodyear* court "achieved consensus because it can be read in radically different ways").

¹¹⁹ See Stein, *supra* note 109.

headquarters or major facilities in a state is “at home” there, as is an entity that has organized under the laws of a forum state.¹²⁰ An entity is not at home when it does not have any operations in the state, and the only sales of its products into the forum state are indirect sales that represent a very small part of the entity’s overall business.¹²¹ At a certain point, however, courts will need to confront the question whether entities that make some direct sales in a forum state or that have smaller numbers of employees or offices in a state are subject to general jurisdiction.

A few features of general jurisdiction analysis increase the likelihood that these inquiries will not result in total doctrinal gridlock. First, the metric for relatedness is relatively clear and unidimensional. Courts will need to address the relative volume of the various contacts, but with the focus unclouded by the relationship of each contact to the lawsuit, courts can systematically investigate the importance and weight of each contact with the forum, and the combined impact of any and all contacts put together.

Second, general jurisdiction analysis cast in these terms is a much better subject for application of the rule and results to other cases. The most obvious example is how courts can apply findings of general jurisdiction to repeat players in litigation.¹²² If general jurisdiction is truly general, a finding regarding the amenability of a business entity to jurisdiction in a state in one lawsuit should transfer seamlessly to others. To the extent that different judges can, and perhaps should, disagree on the application of general jurisdiction to smaller entities at the margins, appellate courts can take the opportunity to let competing holdings develop in the trial courts and then resolve differences through appellate opinions of cases where there is a solid factual record from the lower court. The findings of general jurisdiction should also be easier to apply across different defendants of similar size and contact, so long as the courts writing the opinions follow Justice Ginsburg’s lead and are clear about *which* contacts count and *why*.

¹²⁰ *Goodyear Dunlop*, 131 S. Ct. at 2853–54 (noting that an entity is subject to personal jurisdiction where it is domiciled). The *Goodyear* decision does not appear to disturb the understanding that, unlike the principal place of business for purposes of domicile under § 1332, a non-natural person might have more than one domicile. 28 U.S.C. § 1332 (2006). It also does not appear to dictate that the § 1332(c) definition of principal place of business be determined by the “nerve center” test defined in *Hertz v. Friend* for purposes of subject-matter jurisdiction. *See Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193–94 (2010). *But see* Stein, *supra* note 109, at 538 (advocating a definition of “at home” based on a singular “citizen-like affiliation” with the forum state).

¹²¹ *Goodyear Dunlop*, 131 S. Ct. at 2853–54.

¹²² *See* Lawrence E. Rothstein, *The Myth of Sisyphus: Legal Services Efforts on Behalf of the Poor*, 7 U. MICH. J.L. REFORM 493, 501 (1974) (“The large-volume litigant is able to achieve the most favorable forum . . . [by] tak[ing] advantage of differences in procedure among courts at the state and federal levels . . . to encourage assumption of jurisdiction in higher courts.”).

Third, these inquiries will be at their most useful if the courts let go of the idea that there is a single, ideal, Platonic form of general jurisdiction that will suddenly announce itself if the courts wait long and hard enough. Approaching the line between “close enough” and “not close enough” asymptotically is a perfectly reasonable exercise for the common law development of the rule and its application to individual cases. Thus, despite the vagaries of the “at home” question, *Goodyear* has successfully created space for courts to define the contours of general jurisdiction in a more organized fashion. More importantly, by speaking with a unanimous voice in defining the terms of the debate, the Court has shown a commitment to moving beyond decision paralysis, if only in one part of personal jurisdiction doctrine.

The problem, of course, is that general jurisdiction does not tell the whole story. Specific jurisdiction will continue to be an important part of the jurisdictional story, especially if *Goodyear* has the effect of tightening the boundaries of general jurisdiction.¹²³ If the only way the Court can avoid decision paralysis is to effectively excise the difficult relatedness problem from the picture altogether, there is no reason to believe that it will be able to move beyond the relatedness problem in specific jurisdiction. Once the Court has chosen specific jurisdiction for its model of how much of personal jurisdiction will be exercised, it must confront head-on the questions of *why* and *how* the relationship between the lawsuit and the forum state matter.

II. RETURNING TO SPECIFIC JURISDICTION

The Supreme Court has come to a standstill on how to cope with the stream of commerce problem in personal jurisdiction. Aside from concluding in *Goodyear* that the Brennan stream of commerce doctrine is insufficient for general jurisdiction purposes,¹²⁴ *Nicastro* left the stream of commerce problem mostly unresolved. In this Part, I call on the courts to reinvigorate the concept of specific jurisdiction, to squarely confront *why* a relationship between the lawsuit and the forum matters, and to delineate *how* that relationship should be considered in personal jurisdiction analysis.

As a technical matter, courts have not literally forgotten about specific jurisdiction. If anything, specific jurisdiction has become so pervasive that its existence is taken as a given.¹²⁵ Currently, the Supreme Court appears to treat specific jurisdiction as an uncontroversial premise rather than a conclusion to be reached. Lower courts are also sometimes guilty of this phenomenon, and “[i]n many cases . . . courts fail to

¹²³ See Twitchell, *supra* note 7, at 680.

¹²⁴ *Goodyear Dunlop*, 131 S. Ct. at 2854–57.

¹²⁵ See *id.* at 2854 (“Since *International Shoe*, this Court’s decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction . . .”).

mention the specific/general distinction and relatedness.”¹²⁶ Treating specific jurisdiction as an uninteresting premise, however, can weaken the very foundation of that premise, because “the assertion that suits must be related to the affiliating conduct simply restates the issue, it does not explain why this must be so.”¹²⁷

In *Goodyear*, Justice Ginsburg accuses the North Carolina Court of Appeals of “[c]onfusing or blending general and specific jurisdictional inquiries,”¹²⁸ but, of course, this is precisely what went wrong in *Nicastro*. Without a theory of specific jurisdiction to guide them, the plurality appealed to more global notions of sovereignty and federalism to vacillate between the importance of the connection of the lawsuit and the forum and the contacts that the defendant had with the forum more generally.¹²⁹

The first task is to recognize the analytical distinction between the two dimensions of relatedness outlined in Part I. Addressing separately the relatedness of the lawsuit to the forum does not diminish the importance of assessing a defendant’s connection with the forum itself. However, a specific jurisdiction theory needs a clear account of *why* a defendant’s connection with the forum is important. Any robust specific jurisdiction theory will need to “account for why some contacts are more jurisdictionally significant than others.”¹³⁰ If it is only important because of its connection to the lawsuit, the connection between the lawsuit and the forum must be clarified. If, however, there is some other reason to value a defendant’s contacts (or lack of contacts) with the forum that have only a tenuous connection to the lawsuit, then these purposes also must be clarified.

A. *Avoiding Abstract Relatedness Questions*

Refocusing specific jurisdiction analysis requires more than simply teasing out specific jurisdiction from general jurisdiction. It will also mean that the Court needs to construct specific jurisdiction doctrine in a way that avoids abstract relatedness inquiries. Abstract relatedness inquiries occur when courts attempt to answer generalized questions about how claims, parties, or lawsuits are related without prior agreement on why those questions are being asked or how they should be answered.

The relatedness problem has been explored to the extent that it intersects with similar problems in substantive areas of law, such as the

¹²⁶ Rose, *supra* note 14, at 1557.

¹²⁷ Perdue, *supra* note 4, at 543.

¹²⁸ *Goodyear Dunlop*, 131 S. Ct. at 2851.

¹²⁹ This uncertainty extends to state court decisions as well. See Rhodes, *supra* note 43, at 139 (“[D]espite the preeminence of the contacts analysis in jurisdictional queries, confusion regarding the appropriate parameters of specific and general jurisdiction plagues the jurisprudence of many states.”).

¹³⁰ Stein, *supra* note 27, at 418.

causation problem in torts.¹³¹ I would like to suggest, however, that there is a particular *procedural* dimension to the relatedness problem, and that attention to this issue is long overdue.

The relatedness problem in civil procedure occurs whenever a court must answer the question: How common is common enough? This question possesses the unfortunate quality of being both impossible to avoid and nearly impossible to answer. For example, the joinder rules, particularly as they are drafted for use in the federal courts depend on whether claims or parties meet threshold of relatedness.¹³²

One only needs to take a few steps into the world of joinder devices before encountering the relatedness problem. The relatedness problem in joinder is easy enough to understand. If the purpose of joinder devices is to package claims and parties for the fair and efficient resolution of controversies,¹³³ then one needs a clear sense of which claims and which parties fit together. Several joinder devices rely upon the standards of “transaction or occurrence” or “common question of law or fact” to determine relatedness. The commonalities approach has not produced a coherent standard or approach to the relatedness problem in joinder, and judicial opinions applying the “transaction or occurrence”¹³⁴ and “common question of law or fact”¹³⁵ standard are notorious for a lack of coherence within each joinder device and across the joinder devices in which those phrases are used.

Despite the repeated use of the “transaction or occurrence”¹³⁶ and “common question of law or fact” language,¹³⁷ the definitions of these terms are notoriously elusive. One judicial strategy has been to define a phrase simply by reference to another standard. For example, a classic definition states that claims arise from the same “transaction or occurrence” if the claims bear a “logical relationship” to one another.¹³⁸ The “logical relationship” test gives about as much content to

¹³¹ See, e.g., Rose, *supra* note 14, at 1577–78.

¹³² See Effron, *supra* note 10, at 762, 770–73.

¹³³ See, e.g., Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 107 (1989); Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 813 (1989); Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1728–29 (1998); John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 710 (1976).

¹³⁴ FED. R. CIV. P. 20(a).

¹³⁵ FED. R. CIV. P. 42(a).

¹³⁶ See, e.g., FED. R. CIV. P. 13(a)(1)(A) (A claim that “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim” is compulsory.); FED. R. CIV. P. 15(c) (Relation back of amended complaints is permitted under a “conduct, transaction or occurrence” standard.).

¹³⁷ See, e.g., FED. R. CIV. P. 20(a) (permissive joinder); FED. R. CIV. P. 23(a)(2) (class actions); FED. R. CIV. P. 24(b) (intervenor); FED. R. CIV. P. 42(a) (consolidation by the court).

¹³⁸ See *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926).

“transaction or occurrence” as “purposeful availment” does to “minimum contacts,” yet courts persist in using it as both argument and conclusion.¹³⁹ Another strategy seems, at first, hardly to be a strategy at all: ignoring or brushing aside the scatter plot of seemingly dissonant joinder decisions, the inconsistencies of which are explained away by vague references to the need for broad judicial discretion in the case-management context.¹⁴⁰

In my previous work, I have suggested that these and other variations are not simply the product of fact-specific situations and discretionary decision-making. Instead, they are the result of the failed commonalities approach to joinder. In place of the relatedness standards, the courts have developed shadow rules of joinder that loosely govern the standard for various joinder devices.¹⁴¹ While courts have avoided directly addressing the relatedness question, one can still identify patterns in joinder decisions. It is from these patterns that two shadow rules of joinder emerge.¹⁴² The shadow rules demonstrate that some judges are anxious to dispense with the commonalities problem and focus instead on the more *practical* concerns implicated by the various joinder devices.¹⁴³ Joinder thus demonstrates that the relatedness problem is nearly impossible to answer with a simple, easily identifiable, bright-line rule. Because judges understand that the broad question, Are these claims (or parties) related? is impossible to answer in a principled and generalizable way, they have spurned careful engagement with the relatedness problem as a whole.

This sort of decision avoidance is problematic, as are the shadow rules of joinder it has produced. The shadow rules represent a large lack of transparency in joinder decisions. The most obvious way in which joinder decisions lack transparency is the want of a meaningful or identifiable standard for “transaction or occurrence” or “common question of law or fact.” The standards defining these phrases are elusive and opaque. There is, however, another level at which these decisions lack transparency: the veil of discretion masks a variety of deeper underlying concerns. A decision that supposedly investigates relatedness might actually reflect a court’s opinion on the desirability of certain causes of action, on whether a defendant should be entitled to repose in a given situation, or on whether litigating the claims of several plaintiffs together would *in fact* be more efficient during motion practice,

¹³⁹ See C. Douglas Floyd, *Three Faces of Supplemental Jurisdiction After the Demise of United Mine Workers v. Gibbs*, 60 FLA. L. REV. 277, 291–92 (2008); Douglas D. McFarland, *Seeing the Forest for the Trees: The Transaction of Occurrence and the Claim Interlock Civil Procedure*, 12 FLA. COASTAL L. REV. 247, 262 (2011).

¹⁴⁰ See Effron, *supra* note 10, at 769.

¹⁴¹ See generally Effron, *supra* note 10.

¹⁴² Specifically, redescription and implied predominance. For a discussion of redescription, see *id.* at 773–789. For a discussion of implied predominance, see *id.* at 789–804.

¹⁴³ *Id.* at 809.

discovery, or trial. In other words, the commonalities approach hides more nuanced concerns specific to each joinder device, but also hides judicial sentiments regarding the relative desirability of certain causes of action or feelings about groups of claimants. Judges might even dispense with the relatedness inquiry entirely when it does not suit them.¹⁴⁴ Beyond the lack of transparency, the shadow rules have produced an absence of predictability in joinder decisions—a state of affairs that is particularly problematic for the joinder devices bound up with *res judicata* and the associated values of finality, repose, and the ability to bring a claim.¹⁴⁵

The good news about the shadow rules of joinder is that they show that even if the relatedness question is impossible to answer at the margins, this is not a fatal flaw because there are *other questions* with answers that can supply judges with the relevant information to make their decisions. That is, decision avoidance of the relatedness problem is neither necessary nor preferable. The shadow rules of joinder have emerged for several complex reasons, one of which is the poor fit between the text of the joinder rules and the underlying purpose of each joinder device. The purposes of compulsory counterclaims are not coextensive with those of permitting the joinder of parties or the amendment of complaints with otherwise time-barred claims. If joinder rules were rewritten with targeted standards to better reflect these concerns, then joinder opinions might begin to show a uniformity of *reasoning* within the fact-bound and case-management-rich environment in which trial judges work.¹⁴⁶

The commonalities approach to joinder has failed because of a poor fit between the questions that the standards ask and the purpose that each joinder device is meant to serve. Trying to give general answers to the question, Are these claims or parties related? does not answer the very real and often differing questions underlying each joinder device, such as: Would it be fair to the defendant to prepare a new defense to a new claim?, Would discovery be more efficient if these parties are joined in a single lawsuit?, Will these causes of action have a meaningful overlap in motion practice?, or Should the defendant be required to bring its claim at a time and in a forum that the plaintiff has chosen? In other words, relatedness itself is not what matters in joinder; rather, it is the consequences of certain types of relatedness in certain circumstances that matters.

¹⁴⁴ For example, in *Pendrell v. Chatham College*, 386 F. Supp. 341, 344–46 (W.D. Pa. 1974), the District Court found that two claims were unrelated, despite arising from nearly identical facts. This is a clue that even when the commonalities question is technically answerable, it does not answer the *concerns* that underlie particular joinder devices, in this case, Rule 15(c).

¹⁴⁵ See Effron, *supra* note 10, at 811, 815.

¹⁴⁶ *Id.* at 814–18.

The lesson for personal jurisdiction is that courts do not do well when they try to answer generalized and unfocused relatedness questions.¹⁴⁷ The current specific jurisdiction doctrine as articulated by Justice Kennedy and Justice Breyer in their respective *Nicastro* opinions makes precisely this mistake. However, this also means that it might be possible to right the ship of specific jurisdiction merely by asking good and focused specific jurisdiction questions and without freezing at a total impasse imposed by the search for the perfectly crafted theoretical underpinnings for this basis of jurisdiction.

B. Refocusing Specific Jurisdiction Analysis

Just as I have advocated rethinking the rules of joinder to craft better standards that fit the purposes of each joinder device, I would suggest that specific jurisdiction analysis be subject to a similar refocusing of standard and purpose. In other words, instead of asking the overwhelming question of what it means for a case to be related to the forum, courts should be asking why *this* case is related to *this* forum. This will mean significantly refocusing the specific jurisdiction debate on specific jurisdiction concerns.

A return to the basic premises of specific jurisdiction does not mean that the Court has to promulgate a single, all-encompassing, and definitive theory of jurisdiction. In fact, the search for a unifying theory can be an unnecessary distraction, as it forces the Court to shoehorn older (and possibly inconsistent) precedent into a unifying rationale while simultaneously worrying about whether the theory can accommodate an infinite combination of future factual scenarios. For example, as Professor Stein has observed, some theories like the “exchange” theory of purposeful availment, have “sidetracked the courts into an empty analysis of jurisdiction based on whether defendant received sufficient benefits from his contacts with the forum.”¹⁴⁸ Concepts like the exchange theory seem empty precisely because they are devoid of what makes specific jurisdiction specific—the ties between lawsuit and the forum. A theory that is focused on the defendant at the expense of focusing on the lawsuit will inevitably come across as unwieldy and overbroad.

Justice Kennedy’s emphasis on sovereignty is a similar red herring. Although state power and sovereignty might ultimately be one legitimate choice for the theoretical grounding of personal jurisdiction as a

¹⁴⁷ The doctrinal difficulties inherent in defining the boundaries of a lawsuit are especially apparent when a court must decide whether ancillary claims over which it would not ordinarily have personal jurisdiction are part of the same lawsuit and therefore might be heard under a theory of “pendant personal jurisdiction.” See generally Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619 (2001).

¹⁴⁸ Stein, *supra* note 27, at 418.

whole,¹⁴⁹ Kennedy does not supply criteria for distinguishing between difficult specific jurisdiction cases. The reader hears plenty about the importance of purposeful availment and targeting, but has no sense of whether those activities, as connected with this particular lawsuit, are of any importance, nor of whether different contacts in a different lawsuit can or should be evaluated. Similarly, Kennedy does not make use of commentary discussing the interplay of interstate federalism and the assertion of personal jurisdiction.¹⁵⁰ Several of these theories contain detailed investigations of how a forum regulates a defendant's conduct through litigation, by *ex ante* incentives and signals or by *ex post* enforcement.¹⁵¹ These theories demand that courts ask precise and targeted questions about specific jurisdiction because they tie the power of the court in a particular forum to the particular conduct of the defendant, and then tie the conduct of the defendant to the actual lawsuit at hand. What Kennedy's opinion is missing, then, is not only a justification of why sovereignty matters, but a justification of why and how sovereignty and power should matter to the exercise of specific jurisdiction.

All of this means that courts—particularly the Supreme Court—will need to become more comfortable with a reality of specific jurisdiction that has already emerged—that is that different types of cases will be subject to different inquiries about relatedness. With regard to the stream of commerce cases, the Kennedy plurality and the Breyer concurrence have lost sight of why sending a defective product into a forum state matters. Until that question is answered, general appeals to sovereignty, power over the defendant, and undirected observations about “purposeful availment” and “targeting” will continue to confuse and divide the Court, as will worries about the fates of unspecified future defendants in unknown future lawsuits, an unfocused concern that results from a “pervasive . . . analytical framework” that is “uniformly defendant-oriented.”¹⁵²

In a sense, the problem as currently formulated requires courts to answer the following questions: In light of the fact that a defendant's product has found its way into the forum state, what is the defendant's relationship to the forum? Has it been “nudged across the line” from too

¹⁴⁹ See Steinman, *supra* note 3, at 492 (“Many of the principles on which Justice Kennedy relies are not fundamentally inconsistent with a more lenient approach [to jurisdiction].”).

¹⁵⁰ For an example of commentary discussing the interplay of interstate federalism and the assertion of personal jurisdiction, see Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 7 (2010) (suggesting that principles of horizontal federalism can supply a useful framework for understanding personal jurisdiction). See generally Spencer, *supra* note 14.

¹⁵¹ See Brilmayer, *supra* note 7, at 1449; Stein, *supra* note 27, at 416–24 (advocating a regulatory precision theory).

¹⁵² Mullenix, *supra* note 25, at 364.

attenuated to close enough?¹⁵³ As we have seen, courts are not eager to answer these generalized questions of relatedness that smack of a futile exercise in line drawing. Instead, courts' inquiries should be directed toward discerning what is central and what is peripheral in a lawsuit.

There is a lesson here for how courts should formulate the problem. Currently, there is a debate in the lower courts about how relatedness should be defined. The various lower courts have provided differing answers. Some courts require that the contacts should be sufficiently "related" to the cause of action, while others require that the contacts "arise out of" the cause of action.¹⁵⁴ Still others have turned to standards, such as a tort-like "but for" causation standard.¹⁵⁵

It might be, however, that these debates matter very little to the ultimate shape of specific jurisdiction. The choice of "arise out of" might, in theory, be a narrower exercise of specific jurisdiction than "related to,"¹⁵⁶ but the language is irrelevant if courts treat the standard as a generalized relatedness question that cannot be answered in a meaningful way. Just as "transaction or occurrence" has come to mean very little, so has the "arise out of" and "related to" language failed to gain much traction or prominence in the larger debates about jurisdictional limits.¹⁵⁷

III. WHY NATIONWIDE CONTACTS MATTER

In *Nicastro*, the role of national contacts forms a major point of disagreement between Justice Kennedy and Justice Ginsburg. Justice Kennedy, firmly insists upon a "forum-by-forum" analysis, demanding that jurisdiction is proper only when "a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign."¹⁵⁸ Acknowledging that J. McIntyre did in fact "direct[] marketing and sales efforts at the United States," Kennedy concludes that the defendant's "purposeful contacts with New

¹⁵³ Here I borrow from the Court's now-famous language describing how plaintiffs must plead sufficient facts to "nudge[] their claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The recent pleading cases are another example of a quixotic line-drawing exercise, and one that has been severely criticized in academic circles.

¹⁵⁴ See Borchers, *supra* note 38, at 126–27 (noting different standards used by lower courts); Freer, *supra* note 14, at 29 (discussing the difference between the "related to" and "arising out of" standards); Rose, *supra* note 14, at 1577 (discussing how courts assess the causal relationship between contacts and cause of action in order to determine relatedness); Stein, *supra* note 27, at 442 (stating that courts are unclear whether to apply a "related to" or "arising out of" standard).

¹⁵⁵ See Rose, *supra* note 14 at 1568–70.

¹⁵⁶ See Borchers, *supra* note 38, at 126–27.

¹⁵⁷ See Douglas D. McFarland, *In Search of the Transaction or Occurrence: Counterclaims*, 40 CREIGHTON L. REV. 699, 701 (2007).

¹⁵⁸ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011).

Jersey, not with the United States, . . . alone are relevant.”¹⁵⁹ Justice Ginsburg, on the other hand, embraces the relevance of targeting the U.S. market as a whole, finding that J. McIntyre took “purposeful step[s] to reach customers for its products anywhere in the United States. . . . Given McIntyre UK’s endeavors to reach and profit from the United States market as a whole, Nicaastro’s suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim.”¹⁶⁰

Justice Ginsburg prominently displays the fact that her conclusion is a result of *Nicaastro*’s status as a specific jurisdiction case, stating that the defendant “surely is not subject to general (all-purpose) jurisdiction The question, rather, is one of specific jurisdiction”¹⁶¹ Ginsburg then carefully examines the relationship of J. McIntyre to the lawsuit, and the relationship of the lawsuit to the forum:

The machine arrived in Nicaastro’s New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged. On what sensible view of the allocation of adjudicatory authority could the place of Nicaastro’s injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?¹⁶²

In other words, it is the *concept of specific jurisdiction itself* that allows Ginsburg to overcome the sovereignty hurdle placed in front of her by Justice Kennedy.¹⁶³ Ginsburg makes astute observations about modern commerce, noting, for example, that “[t]his case is illustrative of marketing arrangements for sales in the United States common in today’s commercial world,”¹⁶⁴ and that “McIntyre UK dealt with the United States as a single market.”¹⁶⁵ These facts, however, are only as meaningful as the strength of their relationship to the controversy at hand.

This is why Ginsburg’s emphasis on the details of the *Nicaastro* lawsuit itself is so important. Having stressed that the injury took place in New Jersey with a machine manufactured by the defendant for use in any U.S. state including New Jersey,¹⁶⁶ Justice Ginsburg closes the specific jurisdiction loop, overcoming the perception that the activity has “a

¹⁵⁹ *Id.* at 2790.

¹⁶⁰ *Id.* at 2797 (Ginsburg, J., dissenting).

¹⁶¹ *Id.*

¹⁶² *Id.* (footnote omitted).

¹⁶³ Justice Brennan’s *Asahi* opinion “discarded the central concept of sovereign authority in favor of fairness and foreseeability considerations.” *Id.* at 2783 (Kennedy, J., plurality opinion); see also *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116–21 (1987) (Brennan, J., concurring in part and concurring in the judgment).

¹⁶⁴ *Nicaastro*, 131 S. Ct. at 2799 (Ginsburg, J., dissenting).

¹⁶⁵ *Id.* at 2801.

¹⁶⁶ *Id.* at 2800–02.

ubiquity that defies geographical boundaries.”¹⁶⁷ Just as defendant’s contacts with a forum do not hew neatly to state boundaries, the boundaries of the lawsuit itself are similarly fluid.¹⁶⁸ The conduct and events that lead to lawsuits are rarely confined to state borders. Indeed, entire doctrinal fields, such as choice of law, are dedicated to this fact.¹⁶⁹

In future cases, courts should further sharpen this argument. When courts stress that some defendants have directed their behavior at a national or regional area, and this observation is unconnected from the specifics of the lawsuit at hand, the consequences for future defendants seem scary and unconstrained. It can be easy to lapse into Justice Breyer’s mindset of projecting general jurisdiction fears onto a specific jurisdiction case.

National contacts matter, however, not just because this is a modern reality of how a *defendant* might relate to a forum, but because it is a modern reality of how a *lawsuit* might relate to the forum. The contacts that a court would consider might apply with equal force to a lawsuit brought in another forum. Kennedy’s mistake is to conclude that this fact *diminishes* the force that those contacts have in the forum at hand.¹⁷⁰ Ginsburg’s major insight is that specific jurisdiction transforms free-floating contacts with the United States (or a smaller region therein) into meaningful minimum contacts with the forum.¹⁷¹

If this project is to be successful, courts must begin to treat specific jurisdiction as a conclusion rather than a premise, and to give the facts of each lawsuit the respect they deserve instead of treating specific jurisdiction as if it were an undifferentiated, residual category that is an alternative to general jurisdiction. This path is already well trod, and scholars such as Lea Brilmayer have already paid ample attention to the

¹⁶⁷ Spencer, *supra* note 61, at 87 (describing problems with Internet jurisdiction).

¹⁶⁸ See Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 CARDOZO L. REV. 2897, 2900 n.10 (2009).

¹⁶⁹ For this reason, several commentators have suggested that courts raise the prominence of choice of law analysis in resolving personal jurisdiction doctrines. See, e.g., Perdue, *supra* note 4, at 562 (“[T]he most likely basis for any significant personal jurisdiction limitation is choice of law.”); Rose, *supra* note 14, at 1564 (“[O]ne of the major roles personal jurisdiction plays in American law is a backstop for choice of law, [because of the] strong tendency to apply the law of the forum.”) (footnote omitted); Spencer, *supra* note 14, at 659 (“Although the Court has consistently rejected the relevance of choice-of-law analysis to determinations of personal jurisdiction, that position will inevitably have to be reconsidered.”); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 524 (1984) (“Perhaps the most important element of forum unfairness to defendant involves choice of law.”).

¹⁷⁰ See *Nicastro*, 131 S. Ct. at 2790–91 (Kennedy, J., plurality opinion).

¹⁷¹ *Id.* at 2798 (Ginsburg, J., dissenting). Conceptualizing jurisdiction in this way might alleviate concerns that the Brennan test would impose on defendants an affirmative duty to “avoid jurisdiction.” See Stein, *supra* note 27, at 452. In other words, any duty to avoid jurisdiction in a state only follows logically after the defendant has taken *affirmative* steps to target that state by including it in a targeted region as a whole.

nuances of related contacts in personal jurisdiction.¹⁷² With serious theories of relatedness in personal jurisdiction already on the table, the time is ripe for courts to begin applying them in earnest.

To illustrate, imagine Company X, a manufacturer akin to J. McIntyre. The United States as a whole is one of Company X's targeted markets. Its machines adhere to American standards, it has engaged an exclusive distributor to sell its products in the United States, and representatives from Company X have met with various industry executives at relevant industry conventions in typical convention cities such as Chicago or Las Vegas. Justices Kennedy and Breyer are concerned that based upon these facts alone, Company X is now subject to jurisdiction in all fifty states. These facts, however, are closer to what one would expect from a general jurisdiction analysis.

The purpose of specific jurisdiction analysis would be to shift the focus away from the defendant, once nationwide contacts have established that Company X has indeed targeted the individual jurisdictions where its products are foreseeably sold.¹⁷³ A doctrine of nationwide contacts does not *end* the personal jurisdiction analysis, but is an invitation to a court to begin a second front of the relatedness inquiry by looking at the relationship of the lawsuit to the forum. A finding that J. McIntyre is subject to personal jurisdiction in New Jersey for a machine sold in that forum and causing injury in that forum does not mean that a court in Delaware could have permissibly exercised jurisdiction over that case with the New Jersey facts.

This does mean that J. McIntyre is potentially subject to jurisdiction in many states, but it is not subject to jurisdiction in the haphazard and unpredictable way that Kennedy and Breyer fear. Rather, because each incidence of jurisdiction is tied to *particular* facts of *particular* lawsuits that have a connection with the forum, the defendant has an appreciable connection with the forum that goes well beyond a mere failure to avoid jurisdiction by barring its products from entering the state.

Moreover, the more one engages with the facts of a particular lawsuit, the more judges can distinguish individual cases and find limiting principles. For example, a component manufacturer whose products are incorporated into products for myriad markets and whose products bear no indicia that they are designed specifically with the U.S.

¹⁷² See e.g., Brilmayer, *supra* note 7, at 1455–58 (suggesting a standard of “substantive legal relevance” for determining related contacts).

¹⁷³ An Illinois state appellate court hearing a case post-*Nicastro* has already indicated a willingness to interpret the decision to mean that “all the justices found that distribution by an American distributor in the states could be sufficient to establish jurisdiction, given the right set of facts.” Russell v. SNFA, No. 1–09–3012, 2011 WL 6965795, at *8 (Ill. App. Ct. Dec. 16, 2011), *appeal allowed*, No. 113909, 2012 Ill. LEXIS 754 (Ill. May 30, 2012); see also King v. Gen. Motors Corp., No. 5:11–cv–2269–AKK, 2012 WL 1340066, at *8 (N.D. Ala., Apr. 18, 2012) (holding, post-*Nicastro* that GM Canada targeted Alabama when targeting the U.S. market because “if not Alabama, what market does GM Canada serve?”).

market in mind might fail a “nationwide contacts” test to begin with. Additionally, a lawsuit involving a product in a jurisdiction with a very weak connection to the injury might not be sufficient.

Conversely, a strong connection between the lawsuit and the forum is not a substitute for any connection at all between the defendant and the forum. Suppose a product manufactured by one of Justice Breyer’s hypothetical local artisans is purchased in a local market and then taken by the plaintiff to the forum state where an accident happened. This sort of “unilateral activity” by the plaintiff is not affected by a nationwide contacts analysis if the defendant never engaged in activity that would qualify as nationwide targeting in the first place. If, however, the defendant has sold products for use in certain geographical areas, such as specialized racing boats that it knew consumers would use in New York races, this fact of mere foreseeability should not be a barrier to the exercise of jurisdiction.¹⁷⁴

There will always be cases at the margins of relatedness, and the nationwide contacts doctrine does not dispense with these line-drawing issues. I would argue, for example, that the facts of *World-Wide Volkswagen* will always be vexing because the argument that a regional retailer should be able to cabin its activities is just as compelling an argument as is the fact that cars can and should be taken to far away places where they might cause great damage to persons and property in another jurisdiction. The goal is not to erase the difficulties posed by cases at the margins, but to convince the Court that it can articulate a specific jurisdiction doctrine that breaks down the relatedness question into manageable constituent parts, and to further convince the Court that it may entrust the common law development of the doctrine’s factual borders to the state and district courts who hear the cases and develop the record.

For this reason, I believe that an application of Justice Brennan’s stream of commerce approach provides the strongest basis for moving forward with specific jurisdiction doctrine for products liability cases. Brennan’s doctrine is a favorable one from a jurisdictional expansionist point of view—a perspective that I whole-heartedly endorse. Of further importance, however, Brennan’s method is more analytically sound when accounting for the relatedness problem in personal jurisdiction. The stream of commerce doctrine treats the relationship between the defendant and the forum and the relationship between the lawsuit and the forum as analytically distinct categories.

This, ultimately, should be the purpose of dividing the “fairness” analysis from the “minimum contacts” analysis as Brennan did in *Asahi*. Ginsburg’s opinion achieves exactly this result. She does conclude that J.

¹⁷⁴ See *Dejana v. Marine Tech. Inc.*, No. 10–CV–4029(JS) (WDW), 2011 WL 4530012, at *4–5 (E.D.N.Y. Sept. 26, 2011) (interpreting *Nicastro* to mean that the mere foreseeability under this fact pattern precluded personal jurisdiction in New York over a Missouri boat manufacturer for an accident that happened in a New York boat race).

McIntyre has minimum contacts with the state of New Jersey because they have placed items in the stream of commerce that foreseeably could reach and injure someone in the forum state.¹⁷⁵ But, more importantly, the analysis goes on to emphasize that the strong connection of the lawsuit to New Jersey, and importance of the lawsuit both to the state and the plaintiff are factors that strongly favor the exercise of jurisdiction.¹⁷⁶

An advantage of the Brennan rule, then, is to avoid asking the generalized relatedness question that has bedeviled courts.¹⁷⁷ Specific jurisdiction, if taken seriously, should impose on judges a duty to ask sharp and targeted questions about the relationship of the lawsuit to the forum, instead of theorizing generally about the nature of the defendant's overall relationship with the forum state. In this way, meaningful engagement with the concept of specific jurisdiction might lead the Court out of decision paralysis.

The two-step analysis, however, must be meaningful. In commenting on *Nicastro* and *Goodyear*, Professor Freer has observed that Brennan's approach places "an inordinately high burden on the defendant to overcome" a presumption of fairness.¹⁷⁸ Therefore, "the only realistic option for a court wishing to reject personal jurisdiction is to find that the defendant has not forged relevant contacts with the forum."¹⁷⁹ With this caveat in mind, reinvigorating the fairness analysis will be most effective when the fairness analysis is tied to the purpose and exercise of specific jurisdiction in specific cases. Once it is given a precise jurisdictional purpose, the fairness analysis can be directed in service of specific jurisdiction analysis, rather than as an afterthought or a catchall that effectively forces courts to "strain to conclude" that there is an absence of minimum contacts.¹⁸⁰

CONCLUSION

The stream of commerce story in personal jurisdiction is far from over. Although one can hope that the Supreme Court will resolve the debate in the near future, the next round of the debate will come from the federal district and state trial courts that must confront these issues on a day-to-day basis. The Supreme Court has not given the lower courts much meaningful guidance on how the stream of commerce question should be answered. However, the lower courts might do well to show the Supreme Court the ways in which this question is answerable at all.

¹⁷⁵ See *Nicastro*, 131 S. Ct. at 2801 (Ginsburg, J., dissenting).

¹⁷⁶ *Id.* at 2797–98.

¹⁷⁷ A significant problem with the Brennan approach is that it might have put too much pressure on the fairness aspect of the analysis without simultaneously demanding that the fairness inquiry be taken seriously in many cases. See Freer, *supra* note 14, at 2–3.

¹⁷⁸ *Id.* at 2.

¹⁷⁹ *Id.* at 3.

¹⁸⁰ *Id.*

Trial courts, as the shapers and caretakers of the factual record, have an opportunity to return specificity to specific jurisdiction analysis, by emphasizing specific jurisdiction as a conclusion to be reached rather than a starting point for unfocused factual analysis. Lower courts can indicate to the Supreme Court that there are smaller and more salient questions of relatedness that can and should be answered, questions that pertain *both* to the relationship of the defendant to the forum and the relationship of the lawsuit to the defendant and the forum. Perhaps, in this way, the Supreme Court can confront a specific jurisdiction that does not appear to be so general, and from there begin to emerge from decision paralysis.